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No. 83-1615

In the Supreme Court of the United States

October Term, 1983

MICHAEL O'ROURKE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S SUPPLEMENTAL APPENDIX

PETER A. SCHEY*
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TABLE OF CONTENTS

Page

1. Decision of the Immigration Judge (July 12, 1982).....A-1

2. Decision of the Board of Immigration Appeals (May 24, 1983).....A-34

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
IMMIGRATION COURT

Date: July 12, 1982

File: A22 607 396 - New York, NY

In the Matter of:	)	
Michael O'Rourke	)	IN DEPORTATION
	)	PROCEEDINGS
-RESPONDENT-	)	
	)	

CHARGE: Order to Show Cause:

I&N Act Section 241(a)(2), 8 USC 1251(a)(2),

In the United States in violation of law, to wit: Section 291 of the Act - failure to show time, place and manner of entry.
LODGED (1); I&N Act Section 241(a)(2) -entry without inspection.
LODGED (2); - I&N Act Section 241(a)(2) -non-immigrant, visitor remained longer and
LODGED (3); - I&N Act Section 241(a)(5) 8 USC 1251(a)(5) failure to report address or change of address as required by Section 2654 of the Act.

APPLICATION:
I&N Act - Section 245 Adjustment of status to permanent resident, with waivers under I&N Act - Section 1182(h) and
I&N Act - Section 208 Political asylum and
I&N Act - Section 243(h) interdiction of deportation to the Republic of Ireland
Termination or voluntary departure.

IN BEHALF OF RESPONDENT:

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6th & Chestnut Street
Philadelphia, PA

IN BEHALF OF SERVICE:

Thomas Belote, Esq.
Special Assistant U.S. Attorney
Southern District of New York
New York, NY 10007

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 29 year old married male alien. He is a native and citizen of the Republic of Ireland, who last arrived in the United States on or about February 16, 1978 using the identity of one Pat Martin Mannion. He was admitted as a visitor, authorized to remain in the United States as a non-immigrant until March 9, 1978. He remained after that date without authority, as he now admits. Respondent is, therefore, deportable under the second Lodged Charge served on June 17, 1980.[1/] Respondent does not chal-

lenge that conclusion in any respect.

The record conclusively demonstrates that respondent's entry, under a false identity, and his clandestine sojourn, until the time of his apprehension by the Immigration Service were part of a wilful and deliberate pattern, which developed after his escape from prison in the Republic of Ireland. It continued at least until he was apprehended by the Immigration and Naturalization Service here in the United States. At no time during that period did the respondent ever report his true identity or place of residence in the United States. No other conclusion is possible than that his failure to report his address to the Immigration Service was the conscious and wilful act of a fugitive. There is not a scintilla of evidence presented by the respondent which would warrant a conclusion that his failure to report his address,

as required under Section 265 of the Immigration and Nationality Act, was either excusable or not wilful. Accordingly, I find that the respondent is deportable on the Third Charge lodged in the course of the hearing on June 17, 1980.2/

In view of the foregoing conclusions and events following the institution of the proceeding,4/ with the issuance of the Order to Show Cause on October 30, 1979, it is unnecessary to discuss the propriety of the charge contained in the Order to Show Cause or the second Lodged Charge, served on November 29, 1979, in which it is alleged that the respondent had not been inspected by an immigration officer. I note, in passing, that there is no evidence in the record to show thatthe respondent disclosed the time, place or manner of his entry at the time of his arrest. His acknowledgment of his

true identity and his disclosure of the facts related to his entry under an assumed false and fictitious identity did not occur until the hearing on June 19, 1980. At that time the respondent elected to pursue an application for adjustment of status on the basis of his previously undisclosed marriage.

What I have already said effectively disposes of the question of deportability. I find, therefore, that I need not now discuss those portions of the record which deal with the government's effort to identify respondent through the introduction of extensive testimony and documentary evidence. Obviously, the production of that evidence and its relevance to the issue of deportability has become significantly less important to the disposition of the entire case. It is no longer critical to the issue of deportability. The proceedings have seen the respondent

transformed from a person suggesting that he may have been unjustly accused to that of an alien applying for a variety of discretionary benefits, which might entitle him to remain in the United States in one status or another. They will be considered seriatim.

I. THE APPLICATION FOR ADJUSTMENT OF STATUS

Respondent applied for adjustment of status on June 19, 1980 under Section 245 (Exhibit 33.) He claims visa availability based on the approval of a visa petition, filed on his behalf on June 19, 1980, and approved by the Board of Immigration Appeals on April 30, 1981. The application for adjustment was accompanied by an application for a waiver of grounds of excludability under Section 212(h) and 212(i) of the Act, 8 USC 1182(i). (Exhibit 33(g)). The application for a waiver of inadmissibility under

Section 212(h) is sought to overcome excludability because of the respondent's conviction under certain provisions of the criminal laws of the Republic of Ireland. Respondent notes: "Upon this record of criminal convictions it is believed that the respondent may be facially excludable pursuant to Sections 212(a)(9) and (10).[5/]"

The application for waivers of grounds of inadmissibility also cites Section 212(a)19) as a possible ground of inadmissibility. Section 212(i) provides for the waiver of excludability grounded in misrepresentation or fraud in procuring a visa, under Section 212(a)(19).

Each of the three applications made involve the issue of whether or not the crimes for which the applicant was convicted are "purely political offenses" as that term is used in Section 212(a)(9) and (10) of the Act. At this stage of my

decision I will first deal with the discretionary applications which are now pending before me. Those are the applications for adjustment of status and the concurrent applications for waivers of First: inadmissibility by reason of criminal convictions under Section 212(a)(9) & (10), and Second: inadmissibility under Section 212(a)(19) by reason of misrepresentations in connection with the procurement, issuance and use of the non-immigrant visa with which the respondent entered the United States. Assuming waivers, under Section 212(h) or 212(i), are required respondent must show eligibility for those waivers before adjustment under Section 245 can be granted, even if he otherwise merited a grant of relief.

II THE APPLICATION UNDER SECTION 212(h)

In order to qualify for a waiver of inadmissibility under Section 212(h) respondent must establish statutory eligi-

bility before the favorable exercise of discretion need be reached. In this case, to establish his eligibility under the statute, he must first show that he is the spouse of a United States citizen. This the respondent has done by satisfying the Board of Immigration Appeals that his visa petition as the spouse of a citizen should be approved. In reaching my decision concerning respondent's eligibility for Section 212(h). I will assume that the Board's decision with regard to the bona fides of the marriage is correct. In doing so I pass over any doubts which might be engendered by the belated disclosure of the marriage and the extremely limited publicity given to the existence of the union prior to this proceeding.

However, the respondent must show more than the existence of the relationship of husband and wife. He must show

that his exclusion from the United States, by reason of his criminal convictions would result in extreme hardship to his wife. This the respondent has not done. The respondent's marriage was not an open one. There is no evidence that the parties ever lived together in a common household. Indeed, there is no claim that they established their own home during the brief period between the claimed marriage in July, 1979 and the respondent's arrest at the end of October of that year. His wife continued to live with her parents and he continued to occupy his own quarters. Respondent shows no gainful employment in the United States at any time. Respondent's wife has been employed both before and after his arrest. She has always been self-supporting and she continues to be so today. At the time of the claimed marriage the respondents's wife was aware

of the fact that he was a fugitive from justice who had escaped from prison in the Republic of Ireland. She could not have had any reasonable expectation that he would not be detected as an alien unlawfully in the United States. If that were to happen, the couple should certainly have considered the very real risk that he might be required to leave the United States and, possibly, return to the Republic of Ireland. Indeed, in the absence of an extraordinarily sophisticated analysis of the Immigration Law, and all of its ramifications as well, the intending wife could not have anticipated the variety of applications for relief from deportation made here. I doubt that the ordinary layman would have thought that a person similarly situated could remain in the United States without regard to a prior criminal record and fugitive status.

Obviously, if the respondent is required to leave the United States, the wife will be deprived of his companionship, but that is an incident of any separation of husband and wife. Except for that factor there is no demonstrated hardship to the citizen spouse in this case. In reaching that conclusion I do not in any way denigrate the devotion of the respondent and his wife to one another.

III THE APPLICATION UNDER SECTION 212(i)

Respondent also seeks a waiver of inadmissibility under Section 212(i) as an alien who procured a visa or other documentation or entry into the United States by fraud or misrepresentation. In this instance the respondent procured a visa under the name of Pat Martin Mannion for the purpose of travelling from the Republic of Ireland into the United States. He secured his admission through

the use of that fraudulent identity and misrepresentation. Section 212(i) provides that an alien inadmissible under Section 212(a)(19) may be admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the respondent's applying for a visa and admission to the United States. the discretionary grant of that relief does not require that there be a finding of extreme hardship but only that the alien be the spouse of a United States citizen. Here, again, I do not question the bona fides of the relationship between the respondent and his spouse and I reach the application for a waiver of inadmissibility under Section 212(i) in the same posture as the principal application for adjustment of status. In each instance, under section 245 and under Section 212(i), the respondent establishes a

prima facie case by showing visa availability and admissibility under all of the relevant provisions of Section 212(a).

As I indicated above, questions of political offenses and serious non-political crimes are interrelated. They involve what may be complicated questions concerning the construction of those terms in the various provisions of law which are significant in this case. They, perhaps, represent the most significant aspects of this case in terms of its final determination. However, even if those questions were not present, there would remain a serious question as to whether or not this respondent's application should be granted in the exercise of discretion; assuming him to be admissible; assuming that he does not fall within the exclusion provisions of Section 212(a)(9) or (10) or (19).

In any case involving an alien, who had entered the United States as a visitor and remained beyond the authorized time, an application for adjustment of status after marriage to a citizen of the United states may often be granted, in the absence of other adverse factors. However, in this case, the record discloses an alien who was a fugitive from justice in his own country, who procured a visa under a false identity; who was, in fact, seeking to escape the authorities of his own country. After entering the United States under a false identity, he continued to remain here clandestinely until apprehended by the Immigration Service. He did not seek asylum or sanctuary under his own name until it served his purpose to do so. He was never a bona fide visitor. He has no ties in the United States other than his wife, who was at all times privy to the

illegal status of her husband in the country and his criminal background. Accordingly, even if he were not inadmissible under Section 212(a)(9) of (10) because of the claimed political nature of his criminal activities, his immigration record involving conscious, wilful deception and fraud would argue against any discretionary grant of the extraordinary relief of adjustment of status and the special consent of the attorney general required under Section 212(i). On that basis the record does not justify a grant of adjustment of status under Section 245. That conclusion stands on its own without reaching the perhaps complicated question of Celtic-Anglo-American relations and political crimes to which I now turn.

IV THE CRIMES

The crimes for which the respondent was convicted and for which he seeks a

waiver of inadmissibility are those described in Certificates of Conviction which are in evidence. (Exhibits 14 and 14A).

The first Certificate (Exhibit 14) relates to convictions before a Special Criminal Court held at Dublin on July 7, 1975 of Michael O'Rourke on two counts, Count No. 2 for possession of explosives substance under suspicious circumstances (Section 4 of the Explosive Substances Act) and Count 4 for unlawfully and maliciously having in his possession firearms with intent to enable any other person by means of such firearms to endanger life. (Section 15(b) of the Firearms Act of 1925, as amended by the Firearms Act of 1964 and 1971). [Emphasis Supplied]

The second Certificate (Exhibit 14a) convictions before a Special Criminal Court held at Dublin on July 9, 1975 of

Michael O'Rourke on three counts. Count No. 3 charged a violation of Section 15 of the firearms act, possession of ammunition to enable any other person by means of such ammunition to endanger life. Count No. 6 charged unauthorized possession of ammunition without a Certificate issued under the firearms Act of 1925/1971.

Count 7 charged possession of an explosive substance under suspicious circumstances in violation of the Explosive Substances Act of 1883.

The Certificates of Conviction are supplemented by the records furnished by the respondent and identified by him in the hearing on October 22, 1981 (Exhibit 43).

The record also includes copies of relevant portions of the statutes, defining the crimes for which those convictions were had. Exhibit 62, placed

in evidence on March 22, 1982 includes parts of the Law relating to Explosive Substances [April 10, 1883] and the Firearms Act of 1925.

V EXCLUDABILITY - Section 212(a)(9)

Section 4 of the Explosive Substances Act provides:

> Any person who makes or knowingly has in his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is making it or does not have it in his possession or under his control for a lawful object shall unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited.

Section 15 of the Firearms Act of 1925 provides:

> Any person who after the passing of this Act has in his possession or under his control any firearms or ammunition -
> (a) with intent to endanger life or cause serious injury to property, or

(b) with intent to enable any other person by means of such firearms or ammunition to endanger life or cause serious injury to property, shall, whether any injury to person or property has or has not been caused thereby, be guilty of felony, and on conviction therof shall be liable to suffer penal servitude for a term not exceeding twenty years, or imprisonment with or without hard labour for a term not exceeding two years, and the firearm or ammunition aforesaid shall be forfeited.

Whether Section 4 of the Explosive Substances Act, standing alone, defines a Crime involving moral turpitude may be open to question. However, no such doubt is engendered by the provisions of Section 15 of the Firearms Act. There the intent to endanger life or cause serious injury is spelled out as the object of the unlawful possession.

I find, therefore, that the convictions of the respondent for violations of Section 15 of the firearms Act are conviction for crimes involving moral turpitude. The respondent is, therefore, excludable under Section 212(a)(9) unless

the crimes are found to be within the "purely political offenses" exception.

VI EXCLUDABILITY Section 212(a)(10)

The first Certificate of Conviction also shows that the respondent was sentenced on July 7, 1975 to be kept in Penal Servitude for a period of six years on each of two counts; 2 and 6. The second Certificate shows his sentence to penal servitude for six years on Counts 3 and 7 and 2 years on Count 6. Accordingly the aggregate sentences actually imposed for the five separate offenses are for five years or more. Respondent, therefore, would be excludable under Section 212(a)(10), as well, unless the "political offenses" exception is applicable.

POLITICAL OFFENSES

Respondent's convictions were had before Special Criminal Courts in the Republic of Ireland. These courts have been created and activated to prosecute

certain criminal offenses (Scheduled Offenses). The Explosive Substances Act, 1882 and the Firearms Acts 1925 to 1971 are specified as Offenses Against the State by Order given on May 30, 1972. [Exhibit 63].

The respondent and the Service have produced documents and testimony concerning the history and operation of the Special Courts. I do not find that the two views of the same facts which seem to exist require precise definition before we arrive at our disposition of the matter. The general problem may be perceived as follows:

1. Irish Nationalist objection to continued British control of the six counties of Ulster erupted into violent demonstrations in Northern Ireland once again in 1969. The intensity of these clashes between Irish nationalists and loyalists in Northern Ireland has left a

trail of death and terror whose end is not yet in sight.

2. The Irish Republican Army (IRA) or Provisional Irish Republican Army (P.I.R.A.) and other groups have been identified with the activist and/or terrorist activities in Northern Ireland. The I.R.A. and for P.I.R.A. actions have not been confined to Northern Ireland. Their organizational and operational activities have also been carried on in the Republic of Ireland. In addition to isolated acts of terror (assassinations for example) the Republic has been used as a relatively privileged sanctuary to support the terrorist activity in Northern Ireland.

To combat those activities the Irish Government has invoked special measures, including the Offenses Against the State Act, 1939 and the reactivation of a system of Special Courts to try those

charged with violations of certain Scheduled Offenses, including the Explosive Substances Act 1882 and the Firearms Act 1925 to 1971. The respondent's convictions were for offenses under those Acts, tried before such Sspecial Courts.

3. The respndent is or was a member of the IRA. He readily admits his membership and commitment. The criminal activities for which he was convicted were undertaken on behalf of the IRA or PIRA according to the respondent.

In substance then the respondent claims his crimes were political offenses because they were undertaken in support of IRA objectives. Those objectives have not been fully articulated despite the comparatively lengthy record. Broadly speaking they envisage an end to British sovereignty anywhere in Ireland.

In theory, at least, some of the

activists call for a totally new system of government for all of Ireland and its four historical provinces. At best that objective is one held by only a small element of the splintered groups. But assuming a broader spectrum of opinion supported it, the language of the Seventh Circuit is instructive:

> Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past. An on-going, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence. Once the circumstances move away from that context, the judiciary's task of determining what degree or type of violent disturbance permits a successful invocation of the political offense exception becomes more difficult. It also poses a different question of proof then otherwise may be involved. See generally Lubet & Czackes at 206, 208-10.
>
> For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure (Tr. 805) as an incident of the

expulsion of a certain population from the country and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere. Ziyad Abu Egin v. Wilkes, 641 F2d. 504, cert. denied ____ U.S. ___, 102 S.Ct 390 (1981).

Although EAIN dealt with extradition, and I am here dealing with Deportation and the Refugee and Asylum provisions of the Immigration and Nationality Act, the rationale is, if anything, more persuasive

in this context.

Here the respondent was not a part of an organized, identifiable, discrete force openly at war with the State.[7] At best he was a member of a clandestine secret group, whose energies were directed against the authorities of Northern Ireland, not the Republic whose laws he violated. As such I conclude that the offenses for which he was convicted were for Acts of a criminal nature which were not "purely political" within the meaning of Section 212(a)(9) or 212(a)(10).[8] The same acts performed in the United States in relation to arms and explosives would also be criminal even if carried out for the same purpose. (See 18 USC Section *831 et seg.)

VIII ASYLUM OR WITHHOLDING DEPORTATION

Respondent has applied for asylum under Section 243(h) of the Act. Under those sections the respondent must show

he is a refugee under Section 101(a)(42) or that he is unwilling to return to the Republic or Ireland because of "persecution or a well founded fear of persecution because of race, religion, nationality, or membership in a particular social group or political opinion,"... In his request for asylum the respondent cites his membership in the IRA and his political opinion as the reasons for which he believes he would be persecuted (Exhibit 44, Item 17). If returned to the Republic of Ireland he states he believes:

> I would be placed in prison to serve the remainder or my sentence for purely political crimes and I would be placed on trial and sentenced for my escape for which I could receive a maximum sentence of life imprisonment.

Unless reject the right of the Republic of Ireland to punish criminal activity within its territory, the idea that such prosecution and enforcement is persecution must be rejected.

The respondent and government produced documents and testimony on the Special Courts and their procedure.[9] I do not find any fundamental factual issues. There are Special Courts, with special procedures involving, among other differences from the ordinary courts, trial by Judges without a Jury and procedural rules differences. Appeals through the Irish court system are allowed.

There are differences in the views of the respondent and the government's witnesses as to the penal conditions imposed. On the one hand, it is indicated that the Irish Government segregates the criminals from the Special Court as political prisoners with special privileges in the prison.[10] The government's witness stated that they are treated as all other criminals, no worse - no better.[11] Either view belies mistreat-

ment or torture and the like.[12/] To be sure, there is a deprivation of freedom following a criminal trial. I do not find that to measure up to the statutory requirement of persecution under section 101(a)(42) or Section 243(h). The request for asylum or an order interdicting deportation to the republic of Ireland will be denied.

IX VOLUNTARY DEPARTURE

The respondent, having been found deportable under Section 241(a)(5) may not be authorized to depart voluntarily under Section 244(e). Respondent has designated Sweden as the place to which he would wish to be sent, if deported.

The following orders are entered:

ORDER: It is ordered that the respondent be deported from the United States to Sweden on the second and third LODGED CHARGES, only.

IT IS FURTHER ORDERED THAT if the

aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to the Republic of Ireland.

IT IS FURTHER ORDERED that the respondent's application for Adjustment of Status and waivers of inadmissibility be denied.

IT IS FURTHER ORDERED that the request for asylum under Section 208 be denied.

IT IS FURTHER ORDERED that the request that deportation to the republic of Ireland be interdicted be denied.

FRANCIS J. LYONS
IMMIGRATION JUDGE

FOOTNOTES

1. Notice of Additional Charges, Exhibit #31.

2. Notice of Additional Charges, Exhibit #32.

3. My Conclusions throughout this decision are made in my consideration of the record as whole. Prior to assuming jurisdiction of the Matter, I familiarized myself with the Record of Proceedings held before Judge Hupp, whom I replaced on June 29, 1981 due to his recusal. See Exhibit 40.

4 Questions raised by respondent's counsel while the matter was pending before Judge Hupp concerning the institution of the proceedings, for example, are not pressed in his brief filed in letter form dated May 4, 1982. I assume they have abandoned.

5. Respondent's Memorandum of Law, Exhibit 35, page C.

6. Respondent faces expulsion from the United States not necessarily return to the Republic of Ireland. In view of my disposition of the matter, he is free to go to any country that will accept him; failing that the government must first ask the Swedish government to accept him as a deportee.

7 There is no evidence to show the existence of a political uprising against the Republic of Ireland; nor is there any evidence that the government of that country is unable

or unwilling to deal with criminals within its borders. Indeed the sense of the respondent's evidence is that the government is unduly zealous in its efforts to combat criminal activities in aid of the Republicans in Northern Ireland.

8. While it might be argued that I should adopt the official view of the Department of State as to the nature of the criminal conviction, I have not relied on the testimony of Mr. Fields in reaching my conclusion. I make my decision on the basis of my conclusions as an independent judicial officer. Compare: Matter of Mackin, 668 F.2d (2d Cir. 1981).

9. See transcript October 22, 1981 O'Rourke, November 23, 1981 McGuffin, March 22, 1982 Shed____(?) in and March March 23, 1982 Barr.

10. Ibid.

11. Ibid.

12 There is no testimony to the effect that the Irish authorities in the Republic mistreated the respondent: or that he fears they would. There is also no subjective claim made by respondent as to fear of either the authorites of the I.R.A. Compare McMullen v. I.N.S., 658 F.2d 1312 (9th Cir. 1981)

See Paragraph 84, Handbook on Procedures and Criteria for determining refugee Status, Office of the High Commissioner for Refugees, Geneva, September 1979.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

May 24, 1983

File: A22 607 396 - Philadelphia

In re: MICHAEL O'ROURKE
a/k/a PATRICK MANNION

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
James J. Orlow, Esquire
Wasserman, Orlow, Ginsberg & Rubin
Suite 936, Public Ledger Building
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Philadelphia, Pennsylvania 19106

ON BEHALF OF SERVICE:
Gerald S. Hurwitz
Appellate Trial Attorney

ORAL ARGUMENT: October 13, 1982

CHARGE:

Lodged: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Nonimmigrant - remained longer than permitted

Sec. 241(a)(5), I&N Act (8 U.S.C. 1251(a)(5)) - Failed to report address or change of address

APPLICATION: Adjustment of status, withholding of deportation, asylum, or voluntary departure

The respondent appeals from the July 12, 1982, decision of the immigration judge ordering him deported to the Republic of Ireland. He found the respondent deportable under sections 241(a)(2) and 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) and 1251 (a)(5), respectively, for remaining in the United States longer than authorized and having failed to report his address as required under section 265 of the Act, 8 U.S.C. 1305. He also denied the respondent's applications for adjustment of status and voluntary departure as well as for waivers of inadmissibility, temporary withholding of deportation, and asylum. See sections 245, 244(e), 212(h), 212(i), 243(h), and 208 of the Act, 8 U.S.C. 1255, 1254(e), 1182(h) 1182(i), 1253(h), and 1158, respectively. The appeal will be dismissed.

FACTS

The respondent is a 30-year-old native and citizen of the Republic of Ireland, who arrived in the United States on February 16, 1978, using a passport bearing the name Patrick Martin Mannion. He was admitted as a nonimmigrant visitor authorized to remain in the United States until March 9, 1978. He admits that he has remained in the United States longer than authorized and is, therefore, deportable as an overstay on the charge lodged on June 17, 1980, against him, pursuant to section 241(a)(2).

The respondent's name is Michael O'Rourke, and not Patrick Mannion. He used a fraudulent passport bearing someone else's name because he was a fugitive from prison in his native Ireland (June 17, 1980, Tr. p. 374), where he had been convicted on July 7 and 9, 1975, on several counts of illegal possession of

explosive substances, and unlawful possession of firearms to enable another person to endanger life, in violation of section 4 of the Explosive Substances Act of April 10, 1983, and section 15(b) of the Firearms Act of 1925, as amended by the Firearms Act of 1964 and 1971. (Ex. 7, 8, Group Ex. 14) His unlawful activities stemmed from his membership in the Provisional Irish Republican Army (P.I.R.A.).

At his deportation hearing on May 20, 1981, the respondent admitted that he became a full-fledged member of the P.I.R.A. in 1972, manufacturing bombs, mortars and rockets. (Tr. p. 133) He was assigned as an "engineer" to the P.I.R.A. General Headquarters for research and development of ordinance, incendiaries and grenades. (Tr. p. 71, 161) He was also involved in the setting up of P.I.R.A. "engineering factories" for the production of explosives, grenades,

mortars and rockets to be used in Northern Ireland.) Tr. p. 73-74, 77-81) He admitted that these weapons were intended for use against British officials as well as "loyalist" residents of Ulster and "economic" targets. (Tr. p. 82-83, 140, 164) His duties also included inspecting the bombs he manufactured, as well as training P.I.R.A. members in their use. (Tr. p. 84) However, he claims that he did not know some of the specific targets against which his bombs would be used and that he only manufactured their casing and not their explosive parts. (Tr. p. 140)

The respondent managed to escape from the custody of the Irish authorities by using explosives, after arranging to have himself and three others called as defense witnesses in another P.I.R.A. trial. He then resumed his P.I.R.A. activities under the assumed name of Patrick Martin

Mannion. He entered the United States under that name as a nonimmigrant visitor but did not depart as required by March 9, 1978. (March 27, 1980, Tr. p. 218-220) (May 20, 1981, Tr. p. 100-103) He stayed in the United States with his employer, until the latter was sentenced to prison for smuggling weapons to Ireland. (Tr. p. 119-122) In a separate matter not presently before us, we concluded that the respondent qualified as the immediate relative spouse of a United States citizen. See section 201(b) of the Act, 8 U.S.C. 1151(b).

ISSUES

The immigration judge found the respondent ineligible for adjustment of status and voluntary departure in lieu of deportation, and unworthy of either form of relief as a matter of discretion. He also found that the likelihood that he would be imprisoned in his native Ireland

would not sustain his burden of establishing a well-founded fear of persecution for purposes of asylum and temporary withholding of deportation. The respondent contends that his convictions were for purely political offenses, and he should have been granted adjustment of status or the other reliefs from deportation sought. He claims also that if he were deemed excludable, he is entitled to a waiver of inadmissibility under both sections 212(h) and 212(i) of the Act, due to his United states citizen spouse.[1/] He also cites the convictions as evidence that he has a well-founded fear of persecution in Ireland. After reviewing the extensive record before us we agree with the immigration judge's conclusion that the respondent is

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1/ Sections 212(h) and 212(i) can waive excludability for qualifying aliens in the exercise of discretion for crime and fraudulent attempts to enter the United States.

undeserving of discretionary relief from deportation. We also agree that the respondent's incarceration in the Republic of Ireland does not establish his eligibility for temporary withholding of deportation and asylum.

DISCRETIONARY RELIEF

Section 245 of the Act reposes with the Attorney General and his delegates the discretionary power to grant adjustment of status, INS v. Bagamasbad, 429 U.S. 24 (1976); Thomaidis v. INS, 431 F.2d 711 (9th Cir. 1970), cert. denied 401 U.S. 954 (1971); Matter of Arai, 13 I&N Dec. 494 (BIA 1970). Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Ameeriar v. INS, 438 F.2d 1028 (3d Cir. 1971). Thus, an applicant

who merely meets the prerequisites for adjustment of status is in no way entitled to such relief. Jarecha v. INS, 417 F.2d 220 (5 Cir. 1969); Chen v. Foley, 385 F.2d 929 (6 Cir. 1967), cert. denied 395 U.S. 838 (1968).

The burden of proof is upon the respondent to establish not only that he meets all statutory requirements for eligibility but also that he is worthy of the exercise of discretion in his favor. 8 C.F.R. 242.17(d); Ameeriar v. INS, supra; Thomaidis v. INS, supra. Since the adjustment of status of an alien is an extraordinary relief, it should be granted only in meritorious cases. Ameeriar v. INS, supra; Chen v. INS, supra. The exercise of discretion in a particular case necessarily requires a consideration of all the facts and circumstances involved. In Matter of Arai, 13 I&N Dec. 494 (BIA 1970), we held

that where adverse factors are present in a given application, it is necessary for the applicant to offset these factors by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting a favorable exercise of administrative discretion. However, here the negative factors are such, that the favorable exercise of discretion is unwarranted. Consequently, we need not decide whether the respondent is excludable under section 212(a)(19) of the Act before concluding that adjustment relief should be denied.

We acknowledge that the respondent has a significant discretionary factor in his favor in his United states citizen spouse. That is, however, the only significant factor in his favor. That equity

is far outweighed by the extremely serious negative discretionary factors. The respondent admits his involvement with the manufacture of explosives to be used for terrorism. He hedged when asked to disavow indiscriminate political violence. (March 9, 1982, Tr. pp. 115, 117) He escaped from prison by using explosives, and fraudulently obtained a United States visa using an alias. See Balami v. INS, 669 F.2d 1157 (6 Cir. 1982). He continued to conceal his identity until it was no longer possible.2/ Moreover, his spouse was well aware that the respondent was an escapee from an Irish prison, here illegally. (Tr. p. 15, 31, 49-50) Subsequent to the marriage the couple lived separately without her receiving

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2/ The respondent did not reveal his true identity until June 17, 1980, in his fourth deportation hearing, after sustantial evidence had been introduced by the Service in order to establish his deportability. (Tr. p. 351)

any financial support. (Tr. p. 40-41, 47-48) His admission into the United States would be detrimental to our relations with both the Republic of Ireland and Great Britain. (June 29, 1981, Tr. p. 25-27, 63) See Matter of Lee, 13 I&N Dec. 236 (BIA 1969). We concluded that the respondent does not merit the favorable exercise of discretion. The immigration judge properly denied the discretionry applications for adjustment relief. INS v. Bagamasbad, supra; Balami v. INS, supra; Matter of Arai, supra. His conduct has been so reprehensible so as to also warrant the discretionary denial of asylum and voluntary departure in lieu of deportation. Matter of Salim, Interim Decision 2922 (BIA 1982); Matter of Rojas, 15 I&N Dec. 722 (BIA 1982).

PERSECUTION

We must also proceed to evaluate the

respondent's persecution claim, despite concluding that he is undeserving of asylum relief as a matter of discretion. subsequent to the enactment of the 1980 Refugee Act, temporary withholding of deportation pursuant to section 243(h) of the Act is no longer discretionary, in order to prevent refoulment. Matter of Salim, supra. He must establish that he is a "refugee" within the meaning of Section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A). Matter of Lam, Interim Decision 2857 (BIA 1981). That section defines a refugee as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself of herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The respondent bears the burden of proof

in asylum and 243(h) relief applications to establish that his life or freedom would be threatened within the five circumscribed grounds of persecution enumerated in sections 101(a)(42) and 243(h)(1). Matter of Lam, supra; Matter of Exilus, Interim Decision 2914 (BIA 1982); Matter of Dunar, 14 I&N Dec. 310 (BIA 1973); Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978).

We conclude that the respondent has not established a well-founded fear of persecution on account of his political opinion. He has failed to establish that his possible prosecution by the Republic of Ireland would be for political reasons rather than for his criminal conduct.

The terrorist use of explosives has been universally condemned as atrocious in nature. Paragraph 152 of the United Nations Handbook on Procedures and Criteria or Determining Refugee Status

(September 1979) (Handbook), states that in evaluating the political nature of criminal acts "the political element of the offense should outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offense is also more difficult to accept if it involves acts of an atrocious nature." In the past we have used these guidelines as evidence of Congressional intent in interpreting the 1980 Refugee Act. See Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980). We find that the respondent's indiscriminate terrorist use of explosives is atrocious in nature and out of proportion to the political goal of ending British domination over Northern Ireland.

Our conclusion is not changed by the repondent's reference to an annotation in

the State Department Foreign Affairs Manual at 9 F.A.M. 22 C.F.R. 42.91(a)(9) at Note 10, Gordon and Rosenfield, Immigration Law and Procedure, Section 32-502 (1982). The annotation relates that a member of the I.R.A. convicted of armed robbery for participating in an armed raid was found to be convicted of a "purely political" offense and not excludable under section 212(a)(19). We need not decide the respondent's excludability under that section before concluding that adjustment relief is unwarranted.

Moreover, we note that the annotation does not disclose what court made that finding or contain sufficient details to ascertain its applicability to this case. As respondent's counsel recognized at oral argument, such an annotation by itself has no binding effect on our view. In any event, despite similar political goals, the facts here are different. The respon-

dent's activities were the manufacture and supply of explosives to be used for terrorism. His political motivation alone does not justify his terrorist methods. Also, the respondent's crimes were committed in the Republic of Ireland, not in Northern Ireland. They are more like those of an anarchist, even if politically motivated. See Eain v. Wilkes, 641 F.2d 519 at 520-523, (7 Cir. 1981). In Eain, a Palestinian Liberation Organization (P.L.O.) terrorist had bombed a market on the West Bank. Placing the bomb was held not to be an action pursuant to a war, rebellion, or revolution, and therefore not a purely political offense. The Republic of Ireland's prosecution of the respondent for his terrorist activities is a legitimate attempt to protect its citizens from the dangers caused by the respondent's criminal activities.

On the basis of the record, we are

satisfied that the respondent has not shown that he will be persecuted or that he has a well-founded fear of persecution within the contemplation of section 208(a) of 243(h) of the Act. Our conclusion as to the respondent's claim is the same whether we apply a standard of "clear probability," "good reason," or "realistic likelihood." See Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982); Estrella-Reyes v. INS, Civ. No. 81-3157 (9th Cir. November 18, 1982); contra; Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982); Matter of McMullen, 17 I&N Dec. 542 (BIA 1980), rev'd on other grounds McMullen v. INS, supra; see Matter of Lam, supra; Matter of Dunar, supra. Hence, the respondent's appeal from the denial of his application for asylum under section 208 of the Act and withholding of deportation under section 243(h) of the Act is also without merit. The respondent has failed to establish

that the Irish government would politically persecute him if it prosecutes and punishes him for his criminal activities. Such prosecution would not be persecution. Matter of Sun, 11 I&N Dec. 872 (BIA 1966). The applications for asylum and 243(h) relief were properly denied for failing to establish elgibility for such relief.

OTHER ISSUES RAISED

The rest of the legal issues raised by the respondent on appeal are also without merit. His contention that he should be allowed to depose the author of the State Department's Bureau of Human Rights and Humanitarian Affairs opinion in his case has been recently rejected. Matter of Exilus, supra. His argument that the immigration judge lacked jurisdiction over his case because of alleged changes in the pay classification for immigration judges is also meritless. 8 C.F.R. 242.8 provides the jurisdictional

basis for the immigration judge's conduct of the deportation proceedings.

His contention that the immigration judge who initially conducted these proceedings would have ruled differently, but was intimidated into withdrawing, is neither supported by the record nor any longer relevant, because of our independent review of the evidence on appeal. See Carrasco-Pavelau v. INS, 445 F.2d 865 (9 Cir.) cert. denied, 405 U.S. 1030 (1971); Noverola-Bolaina v. INS, 395 F.2d 131 (9 Cir. 1968); Matter of B-, 7 I&N Dec. 1 (BIA 1955). There is also extensive evidence in the record supporting the immigration judge's July 12, 1982, conclusions. Finally, the respondent's contention that he was unfairly charged with failing to register his address during the time he was detained by the Service is a blatant misrepresentation. He was chzrged with failing to report his

address from February 16, 1978, when he arrived here, until apprehended by the Service on October 20, 1979. His demand that the 1981 amendment to Section 265, Section 11, Pub. 97-116, 95 Stat 1617, be given retroactive effect in his case, is inconsistent with the plain language of the General Savings Clause, 1 U.S.C. 109. See United States v. Cahalane, 560 F.2d 601 (3 Cir. 1977). In any event, this latter contention is of no consequence in view of his undisputed deportability under Section 241(a)(2) as an overstay. The appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

PROOF OF SERVICE BY MAIL

State of California

SS.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the county of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 256 South Occidental Boulevard, Los Angeles, California 90057; that on April 9, 1984, I served the within Petitioner's Supplemental Appendix in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Forty copies and original.)

Solicitor General
Department of Justice
Washington, D.C. 20530
(Three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 9, 1984, at Los Angeles, California.

Carlos Holguin
(Original Signed)